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## Video Evidence and Summary Judgment: The Procedure of Scott v. Harris

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# Video evidence and summary judgment

## The procedure of *Scott v. Harris*

by HOWARD M. WASSERMAN

MIKAEL KARLSSON

**T**he Federal Rules of Civil Procedure turn 70 this year—a set of New-Deal-era rules being used to litigate modern federal civil litigation. Last term, the Supreme Court's decision in *Scott v. Harris*<sup>1</sup> merged two elements of modern civil rights litigation in one case with far-reaching procedural consequences.

One element is the dramatic expansion of summary judgment under the Federal Rules over the past 20 years. Summary judgment has morphed from a procedure that halted cases prior to trial only if a jury can reasonably choose only one of several competing factual inferences<sup>2</sup> into "something more like a gestalt verdict based on an early snapshot of the case."<sup>3</sup>

Various studies over the past decade find anywhere from 7 percent to more than 20 percent of all civil cases terminated on summary judgment.<sup>4</sup> A 2007 Federal Judicial Center study found summary judgment motions filed in 17 of every 100 case terminations, more in civil rights cases, with 60 percent of those motions granted in whole or in part, 70 percent in civil rights cases.<sup>5</sup> These numbers

at least suggest a particular attitude towards summary judgment.<sup>6</sup> They also correspond temporally with a dramatic decrease in the number of civil trials.<sup>7</sup>

In *Scott*, the Supreme Court decided that a video of a high-speed police chase provided a singular version of events justifying summary judgment, but the reality is that video evidence provides no greater certainty about "what really happened" than does witness testimony.

The other element is the evidentiary use of video recordings of encounters between law enforcement and citizens, such as interrogations, traffic stops, and, in *Scott*, high-speed chases. Video is widely favored as a way to monitor both

police and citizen conduct, by, it is believed, providing an objective, unambiguous picture of these encounters.<sup>8</sup> Jes-

1. 127 S. Ct. 1769 (2007).

2. Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 785 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Fed. R. Civ. P. 56(c).

3. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1797, 1917 (1998).

4. See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL L. STUD. 591, 592-93, 616 (2004); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments*, 78 N.Y.U. L. REV. 982, 1048-49 (2003); Wald, *supra* n. 3, at 1915.

5. See Federal Judicial Center, *Estimates of Summary Judgment Activity in Fiscal Year 2006* (on file with author).

sica Silbey calls such video proof “*evidence verite*, filmic evidence that purports to be unmediated and unselfconscious film footage of actual events.”<sup>9</sup>

The substantive crux of *Scott* was whether an officer used excessive force in ramming a suspect’s car during a high-speed pursuit as a way of ending the chase. The Court concluded that a “police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”<sup>10</sup> That Fourth Amendment conclusion has received the most attention from lower courts and commentators.<sup>11</sup>

But the Court reached that decision on summary judgment, on its determination that a video of the chase, taken from the pursuing officer’s dash-mounted camera, presented the single “true” version of events and permitted the Court to ignore contradictory testimony from the plaintiff. As a result, there was no issue of material fact as to the reasonableness of the officer’s action and no reason or opportunity for a jury trial. This procedural element likely will have a lasting effect. Courts long have struggled to integrate *evidence verite* into the trial process. *Scott* reflects the Supreme Court’s effort and, arguably, failure to properly integrate video evidence into the pretrial process and summary judgment.

## The video

In March 2001, Victor Harris was clocked traveling 73 mph in a 55-mph speed zone on a county road in Georgia; a county deputy sheriff sought to pull him over. Harris drove off, initiating a high-speed pursuit by several county deputies, including Deputy Timothy Scott. The cars, at times exceeding 85 mph, traveled primarily along two-lane roads, into and around a shopping-mall parking lot, and continued down two-lane highways. After traveling ten miles in six minutes, Scott requested and received permission to perform a maneuver designed to cause Harris’ car to spin to a stop. Instead, Scott bumped the rear of Harris’ car; the car left the roadway, went down an embankment, overturned, and crashed. Harris was rendered a quadriplegic.<sup>12</sup>

Harris sued Scott and Coweta County under 42 U.S.C. § 1983, alleging a violation of his Fourth Amendment right to be free from excessive use of force, a form of unreasonable seizure. Scott moved for summary judgment, asserting an affirmative defense of qualified immunity, which entails a two-part inquiry: 1) Whether the facts and evidence show that the officer’s conduct violated a constitutional right and 2) If so, whether the right was clearly established at the time, in light of the specific factual context of the case, such that a reasonable officer would have known that his particular conduct violated the right. Bumping Harris’ car constituted a seizure, thus the issue on the first prong was its reasonableness. On

summary judgment, the court typically answers the first question by viewing the facts and drawing reasonable inferences in the light most favorable to the non-movant, meaning the court adopts the plaintiff’s version of the facts.<sup>13</sup>

The central issue was whether Harris’ conduct in leading law enforcement on the high-speed chase posed a danger to pedestrians or other motorists or vehicles; if his actions endangered the public, then Deputy Scott’s decision to bump Harris’ car was reasonable. The versions of events presented by Harris and Scott differed substantially, which ordinarily precludes summary judgment; it is for the jury at trial, not the court on summary judgment, to choose between competing reasonable stories grounded on affirmative testimonial evidence from competing witnesses.<sup>14</sup>

But the majority insisted that summary judgment was appropriate because of the “added wrinkle” of a video of the chase recorded from Scott’s dash-mounted camera, which captured the chase from the moment he switched on his siren light.<sup>15</sup> The video told a different story, one that “quite clearly contradicts the version” from Harris. Contrary to Harris’ testimony, this was “a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.” The Court insisted, without citation, that when opposing parties tell different stories and one of those stories is “blatantly contradicted” by the rest of the record (here, the video), a court could (in fact, must) disregard the “visible fiction” of the plaintiff’s testimony and his now-discredited version of events. The ordinary requirement that the court view the facts in favor of the non-movant gives way to the court viewing the facts in the light depicted by the videotape.<sup>16</sup> Having disregarded one version of events, summary judgment became appropriate because a rational jury only could accept the singular, unambiguous version of events presented in the video.

6. See Miller, *supra* n. 4, at 1050.

7. Burbank, *supra* n. 4, at 618; Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1333 (2005).

8. Jessica M. Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 COLUM. J. L. & ARTS, 107, 116 (2005); Ric Simmons, *Why 2007 is Not Like 1984: A Broader Perspective on Technology’s Effect on Privacy and Fourth Amendment Jurisprudence?* 97 J. CRIM. & CRIMINOLOGY 531, 566 (2007).

9. Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J. L. REF. 493, 507 (2004) (emphasis in original).

10. *Scott v. Harris*, 127 S. Ct. 1769, 1779 (2007); *Beshers v. Harrison*, 495 F.3d 1260, 1267-68 (11th Cir. 2007).

11. *Beshers v. Harrison*, 495 F.3d 1260 (11th Cir. 2007); Andrew T. George, *Rediscovering*

*Dangerousness: The Expanded Scope of Reasonable Deadly Force after Scott v. Harris*, 93 VA. L. REV. IN BRIEF 129 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/george.pdf>.

12. *Scott*, 127 S. Ct. at 1773.

13. *Id.* at 1774-76.

14. Miller, *supra* n. 4, at 1067; Redish, *supra* n. 7, at 1355.

15. The Court took the unprecedented step of “allow[ing] the video to speak for itself” by posting it on the Supreme Court’s web site. *Scott*, 127 S. Ct. at 1775 n.5; [http://www.supremecourtus.gov/opinions/video/scott\\_v\\_harris.rmvb](http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb). Many hailed this as indicating that the justices were becoming more in-tune with modern technology and, in effect, modern procedure. See [http://www.abovethelaw.com/2007/04/video\\_clips\\_not\\_just\\_for\\_onlin.php](http://www.abovethelaw.com/2007/04/video_clips_not_just_for_onlin.php).

16. *Scott*, 127 S. Ct. at 1775-76.

## Video evidence on summary judgment

On its face, *Scott* is a case for which summary judgment never should be appropriate. The primary proof of what happened during the chase was the competing testimony of the two parties, two sides telling different affirmative stories. As a formal matter, a court on summary judgment should not choose between conflicting testimony; it should assume that the non-movant's version would be believed, then consider whether a reasonable jury could resolve the case in his favor based on that evidence.<sup>17</sup> The bromide long has been that, for purposes of summary judgment, "a single scoundrel's testimony may outweigh that of forty bishops."<sup>18</sup> The notion that one party's testimony could be "blatantly contradicted by the record" is inconsistent with summary judgment, at least in a case involving affirmative testimonial versions of events.

The video, however, changed this from a he-said/he-said case of competing eyewitness testimony. Harris' testimony simply was inaccurate and wrong and could be disregarded because it conflicted with the video that the Court could view for itself. This assumed, of course, that the video was, as a matter of law, accurate and correct. The video made the truth, and thus the only reasonable result—judgment in *Scott*'s favor and against Harris—so obvious that trial was unnecessary. In light of the video, which told a singular incontrovertible story, no reasonable fact finder could believe Harris' version of events. Thus the Court's unsupported insistence that it could ignore testimony that was contradicted by other, non-testimonial evidence.

Commentators frequently complain that courts on summary judgment often credit and adopt one of two versions of facts, even where either seems reasonable.<sup>19</sup> But *Scott* may be the first time the Court has been so explicit about rejecting one story because evidence shows a "better" story. And that explicitness results from the presence of video evidence. It allowed the majority to

respond to, and decide the case on, its "brute sense impressions."<sup>20</sup>

### Three myths

But in treating the video as truthful, unbiased, objective, and unambiguous, and thus deserving of controlling and dispositive weight on summary judgment, the Court silently bought into the three basic, related myths that Jessica Silbey has identified about video evidence and *evidence verite*.

The first is that film is an objective, unbiased, transparent moral observer, producing an evenhanded reproduction of reality.<sup>21</sup> Video evidence is the "proverbial smoking gun," raw evidence incontrovertibly showing what happened in the real world.<sup>22</sup> The video becomes "an unimpeachable eyewitness, . . . testifying to the only version of what happened."<sup>23</sup> In fact, video replaces the eyewitness, making live testimony and corroboration unnecessary.<sup>24</sup> Or, on summary judgment, allowing the court to disregard testimony altogether in favor of the video. This was captured by the Court's insistence that the video could "speak for itself."<sup>25</sup>

The second myth is that the meaning of the video is unambiguous and obvious to the viewer, the "last and best word on what happened" in the real-world events.<sup>26</sup>

The third myth is that the video transforms the viewer into an eyewitness to real events, the video "merely an extension of the jury's eye."<sup>27</sup> Viewers believe they are witnessing the events as they occur and thus fully understand the truth and meaning of those events.<sup>28</sup>

Unfortunately the Court got caught up in these myths. Video of an event is not the event itself, but merely evidence of the event. Video,

"like any representational form, must be interpreted, and its specific language and its way of constructing meaning must be accounted for."<sup>29</sup> Factfinders must interpret and judge a film's message, just as they interpret and judge all evidence and testimony; "[j]ust as no witness is infallible, no film is singular in its meaning or significance."<sup>30</sup> The *Scott* majority ignored all of this. The video put the justices on the scene of the chase and told them what happened. They did not need to hear from witnesses, least of all from a witness such as Harris, whose testimony would contradict what the justices knew they saw, as a matter of law, on the video. And the jury did not have to hear any of it.

### Two different stories

Justice Stevens recognized these myths in his sharply worded dissent. Stevens watched the same video, but saw a different event—not only was there not obviously a danger to the public in the chase, there were not even any "close calls."<sup>31</sup> The video told Stevens that no pedestrians, parked cars, or private residences were visible in the video at any point, meaning there was no risk to person or property in the chase; Harris never lost control of the car and signaled whenever he changed lanes or went across the center line to pass; and the cars that he did pass already had pulled over to the side of the road, perhaps in response to the police siren.

Stevens' larger, though unstated point, was that the chase video, as with other film evidence, was not unambiguous and its narrative not single or obvious. Nor did the video alone tell the entire story. Consider, for example, whether Harris ran any

17. *Anderson*, 477 U.S. at 249.

18. Richard L. Marcus, *Completing Equity's Quest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 772 (1989).

19. See Miller, *supra* n. 4, at 1067.

20. Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes Are You Going to Believe? An Empirical (and Normative) Assessment of Scott v. Harris*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1081227](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081227).

21. Silbey, *Filmmaking*, *supra* n. 8, at 111, 127; Silbey, *Critics*, *supra* n. 9, at 508.

22. Silbey, *Critics*, *supra* n. 9, at 550.

23. *Id.* at 519.

24. Silbey, *Critics*, *supra* n. 9, at 516.

25. *Scott*, 127 S. Ct. at 1775 n.5.

26. Silbey, *Filmmaking*, *supra* n. 8, at 111; Silbey, *Critics*, *supra* n. 9, at 508-09.

27. Silbey, *Critics*, *supra* n. 9, at 519.

28. Silbey, *Filmmaking*, *supra* n. 8, at 124.

29. Silbey, *Critics*, *supra* n. 9, at 519.

30. *Id.*

31. *Scott*, 127 S. Ct. at 1783 (Stevens, J., dissenting).

red lights during the chase, an act that would pose a threat to other drivers and pedestrians. The majority insisted, based on the video, that he ran multiple red lights. But, Stevens suggested, the video actually showed only that the lights were red when the police car passed through the intersection; it did not show the color of the light when Harris' car, some distance ahead of the camera mounted in the trailing police car, went through those intersections.<sup>32</sup> Similarly, all agreed the video showed Harris crossing the center line at several points. But the majority saw him swerving into oncoming traffic, while Stevens saw him signaling and making a routine passing maneuver on a two-lane road, albeit at a high rate of speed.<sup>33</sup>

The point is that the video told the majority and the dissent two very different tales. The video's meaning, and the consistency of any testimony with the video, was not so obvious that a reasonable jury could reach only one conclusion or inference; different interpretations reasonably were possible. The video, in other words, did not, "speak for itself;" it said what different listeners saw and heard. And a new empirical study suggests that what they see and hear turns along cultural lines of race, sex, age, class, and political viewpoint.<sup>34</sup> This renders the majority's insistence that courts view the facts "in the light depicted by the videotape"<sup>35</sup> incoherent as a standard for summary judgment because there is no single and complete set of facts depicted in the videotape. What facts were depicted in the videotape depends on the viewer's interpretation, a determination necessarily left to the finder of fact.<sup>36</sup> Stevens suggested that the majority had usurped the trial function by twice derisively referring to the members of the



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majority as "jurors."<sup>37</sup> Rather, given a video that tells multiple competing stories, summary judgment analysis demands that the Court adopt the interpretation or understanding most favorable to the non-movant, Harris.

### Changed meaning

Moreover, trial itself often serves to undermine the supposedly fixed, transparent, and uncontroversial meaning of film, because the way that a video is viewed, alone or in conjunction with other evidence, may change its meaning. The most famous example of this is the state criminal trial of the Los Angeles police officers accused of beating motorist Rodney King in 1991, where the officers were acquitted despite video evidence of the assault. One explanation for the acquittal was defense success in

attaching a new narrative and new meaning to the video. They did this, in part, by slowing the video for frame-by-frame review and having the officers on the stand explain each individual action by each actor. The result was a reinterpretation of the video; the officers were not on the offensive and beating a helpless victim, but were constantly on the defensive and responding to King's aggressive actions. In essence, defense counsel cross-examined the video, drawing from it a different message, creating ambiguity in its meaning, and allowing the video to corroborate, rather than contradict, the officers' version of events.<sup>38</sup>

One could imagine a similar trial tactic with the video in *Scott*. The reasonableness of Deputy Scott's decision to forcibly terminate the chase turns on whether Harris was a threat

32. Compare *id.* at 1775 with *id.* at 1782 (Stevens, J., dissenting).

33. Compare *id.* at 1775 with *id.* at 1783 (Stevens, J., dissenting).

34. Kahan, et al., *supra* n. 20.

35. *Scott*, 127 S. Ct. at 1776.

36. *Id.* at 1782 (Stevens J., dissenting).

37. *Id.* at 1781, 1782 (Stevens, J., dissenting).

38. Silbey, *Critics, supra* n. 9, at 550.

to other cars, drivers, property, and pedestrians. But imagine Scott testifying at trial as plaintiff's counsel slows the video to a frame-by-frame presentation and, at each frame, questions Scott as to what Harris was doing, what each of the other cars on the road were doing, and what was the specific danger to the public at each point. Of course, defense counsel could utilize the same tactic to undermine Harris' version of events. But that is the purpose of trials with live witnesses and cross examination.

This trial tactic renders the video neutral and ties its meaning back to the testimony of the competing courtroom witnesses. The case once again becomes a he-said/he-said dispute of diverging eyewitness accounts, with the video merely dovetailing onto the witness testimony.<sup>39</sup> The video no longer blatantly and *per se* contradicts Harris' testimony, nor is the Court free to disregard his story on summary judgment. The jury must resolve the competing versions of events, in conjunction with the video, through the ordinary fact-finding processes in which juries engage: evaluating credibility, drawing inferences from everything they had seen and heard, and deciding what all the evidence "means" and what it reveals about what happened on a two-line highway in Georgia and whether Deputy Scott's actions were reasonable.

The lure of video evidence, conceived as providing an unmediated and correct account of events, is particularly strong in a case such as *Scott*. Not only does the video appear singular and unambiguous. But a case based on competing eyewitness accounts is inherently one in which we never can really know what happened in the real world. At best, the jury engages in conjecture, based on its evaluation of witness credibility and other inferences from the evidence it sees.<sup>40</sup> As Martin Redish argues, we "refer to the jury's verdict as the 'accurate' result, but this is simply a convenient method by which we operationalize accuracy, because we simply have no choice."<sup>41</sup> Video evidence, such as a real-time

recording of events, holds out hope for the desired greater certainty as to what happened in police-citizen confrontations.

*Scott* tells us not only that this certainty is available, but that it can be done without even the need for a jury. But the reality is that video evidence provides no greater certainty about "what really happened" during the chase than live-witness testimony from the pursuer and pursued. Recognizing that fact is necessary to avoid further unwarranted expansion of the summary judgment device and further incursion into the jury's role in video-evidence civil-rights actions.

### Conclusion

*Scott* could be understood as adopting a *per se* rule that leading police on a high-speed chase poses an imminent danger to the public and allows officers to use deadly force to end the pursuit.<sup>42</sup> Such a substantive rule justifies the outcome procedurally. What the video showed and meant is irrelevant, since the only material factual issue becomes whether this was a high-speed chase, which was undisputed without regard to the video, entitling the defendant to judgment as a matter of law. Of course, such a rule also renders the majority's entire analysis of the video meaningless.

In the wake of *Scott*, courts have begun to see more § 1983 Fourth Amendment actions in which an encounter with police is captured on video and the video plays a role on summary judgment.<sup>43</sup> And some lower courts have begun to wield this *Scott*-granted power to disregard testimony in the face of competing video evidence on summary judgment.<sup>44</sup>

On the other hand, in September 2007, the mirror of the events in *Scott* made the rounds of the internet: A camera mounted in the back of a citizen's car captured an abusive and aggressive police officer during a routine traffic stop, directing profanities at the driver and threatening to arrest him on fabricated charges.<sup>45</sup> The officer was terminated following review of the video by police and city

officials.<sup>46</sup>

The question remains how courts will and should treat that video when the driver brings his inevitable § 1983 action against the officer. Will the court regard the video as the conclusive, unambiguous, objective and "true" version of the encounter? Will the court disregard the officer's testimony if it conflicts with the video? Will the officer be similarly deprived of the opportunity to present his version of events to a jury, if the court finds that version different than its interpretation of the video? Will the court insist that it must view the evidence in light of the video, regardless of the officer's testimony or version of events?

These questions inevitably arise as video recordings of encounters between citizens and law enforcement become more common, on both sides of the encounter. That will determine the long-term consequences of the *Scott* Court's procedural faith that video evidence can and should eliminate all factual disputes and obviate the need for finders of fact and trials. ❧

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39. *Id.* at 498.

40. Redish, *supra* n. 7, at 1352-53.

41. *Id.* at 1352.

42. *Beshers v. Harrison*, 495 F.3d 1260, 1272 (11th Cir. 2007) (Presnell, J., concurring); *but see Harris*, 127 S. Ct. at 1779 (Ginsburg, J., concurring).

43. *Meacham v. Frazier*, 500 F.3d 1200 (10th Cir. 2007); *Green v. New Jersey State Police*, 2007 WL 2453580 (3d Cir. 2007).

44. *Beshers v. Harrison*, 495 F.3d 1260, 1262 n.1 (11th Cir. 2007).

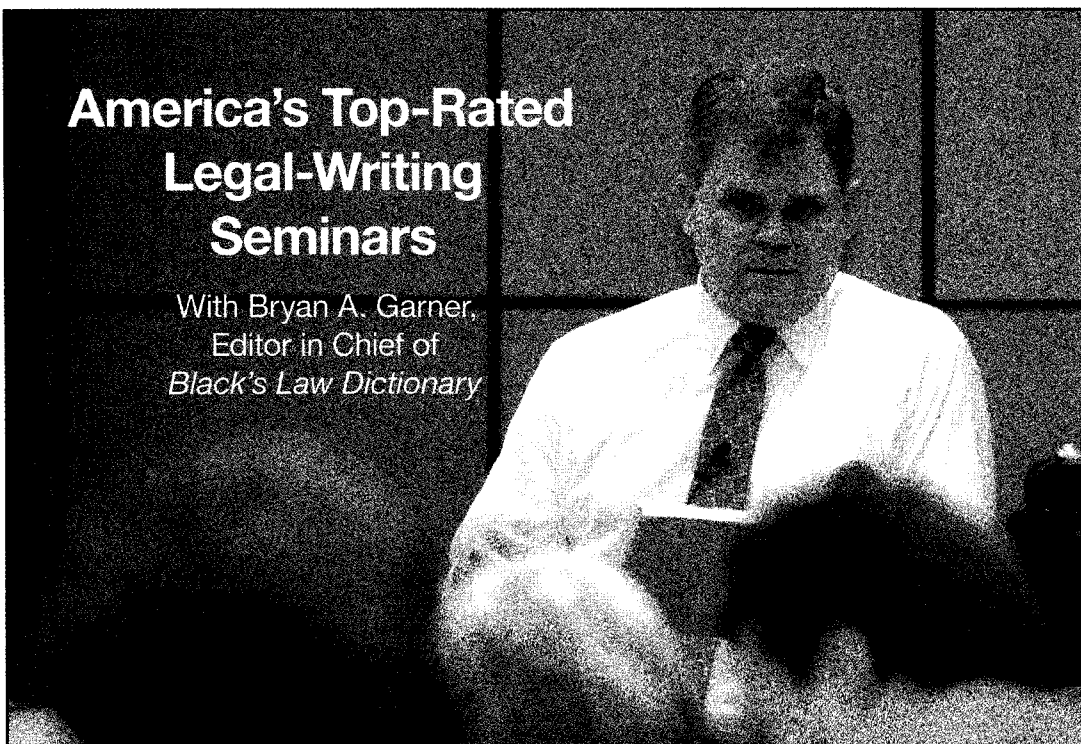
45. <http://www.stltoday.com/stltoday/news/stories.nsf/stlouiscounty/story/EF3667C80165B68086257353001498DC?OpenDocument>. The video quickly began making the rounds on the internet. [http://www.xomba.com/brett\\_darrow\\_cop\\_video\\_0](http://www.xomba.com/brett_darrow_cop_video_0)

46. [http://www.zimbio.com/pilot?ID=&URL=http%3A%2F%2Fwww.ksdk.com%2Fnews%2Fnews\\_article.aspx%3Fstoryid%3D130123%26provider%3Dtop%26ZURL=%2FBrett%2BDarrow%2Ftrackers%2F3%2FNews%2BBrett%2BDarrow%2BSergeant%2BJames%2BKuehnlein](http://www.zimbio.com/pilot?ID=&URL=http%3A%2F%2Fwww.ksdk.com%2Fnews%2Fnews_article.aspx%3Fstoryid%3D130123%26provider%3Dtop%26ZURL=%2FBrett%2BDarrow%2Ftrackers%2F3%2FNews%2BBrett%2BDarrow%2BSergeant%2BJames%2BKuehnlein)



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